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JUL 30 1953
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IN THE

Supreme Court of the United States

346 U.S.
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..... Term, 1953

No. 215

HENRY MACIAS,
Petitioner

vs.

OAKLAND TRUCK SALES, INC.,
a Corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE SUPREME COURT OF THE UNITED STATES

.....Term, 1953

No. .....

Henry Macias,

Petitioner

vs.

Oakland Truck Sales, Inc., a Corporation,

Respondent

I.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Henry Macias, the above named petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered April 9, 1953, which reversed the judgment order of the District Court for the Western District of Pennsylvania, entered October 23, 1951 and ordered that judgment be entered in favor of Oakland Truck Sales, Inc., respondent herein.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania, dated July 17, 1952 is reported in 106 F. Supp. 107. The opinion of the United States Court of Appeals for the Third Circuit, dated April 9, 1953, is reported in 203 F. 2d 205.

JURISDICTION

Jurisdiction to issue the writ is found in the provisions of Title 28, United States Code, section 1254.

The judgment of the Court of Appeals was entered on April 9, 1953, and the petition for rehearing was denied on May 7, 1953.

STATEMENT OF THE CASE

This is an action by the plaintiff-seller against the defendant-buyer to recover the purchase price due as a result of an alleged breach of contract. The District Court entered directed verdicts in favor of all of the defendants except Oakland Truck Sales, Inc. The jury returned a verdict in favor of the plaintiff and against the remaining defendant. The facts as established by the verdict are these:

1. On September 13, 1948, the parties made an oral contract at Los Angeles, California, involving truck parts valued at Seventy-eight Hundred ($7800.00) Dollars (R. 4).

2. At the same time the buyer left with the seller, a check for Two Thousand ($2,000.00) Dollars (R. 4).

3. It was agreed that instructions as to place of delivery would be given later (R. 4).

4. The seller cashed the check immediately (R. 49).

5. On October 19, 1948, in a telephone conversation, the parties agreed to increase the purchase to a total of Thirteen Thousand Two Hundred Thirty-six and 50/100 ($13,236.50) Dollars (R. 42, 120).

6. All but one item on the September 13 contract appeared on the October 19 modification of all of the items on the latter were on the former. Only the amounts were changed (R. 72 and District Court Opinion, footnote 2).

7. In the same conversation of October 19, the buyer told the seller to credit the Two Thousand ($2,000.00) Dollars against the increased purchase and to ship by Union Pacific Railroad to a designated address in Detroit, Michigan (R. 42, 120).

8. The larger order was shipped with sight draft to the Detroit address, with a bill of lading attached in the sum of Eleven Thousand Two Hundred Thirty-six and 50/100 ($11,236.50) Dollars (R. 6, Ex. 4, 5).

9. None of the merchandise was examined or accepted by the buyer, and no further payment was made by him.

10. The goods were ultimately sold for demurrage and shipping costs, by the railroad which sued the seller for a balance due it.

11. The District Court entered judgment in favor of the plaintiff in accordance with the verdict of the jury.

12. The Court of Appeals reversed the judgment of the District Court.

QUESTIONS PRESENTED

1. When the Court of Appeals found that a new contract had been made to which the Pennsylvania Statute of Frauds must be independently applied, did the Court not deprive petitioner of his right to a jury trial as guaranteed by the Seventh Amendment to the Constitution of the United States?

2. Does not the decision of the Court of Appeals transcend the traditional concept of the power of an appellate court thus establishing a precedent which should be passed upon and reversed by this Honorable Court?

3. Does not the judgment of the Court of Appeals erroneously apply the decisional law of Pennsylvania with regard to the application of the Pennsylvania Statute of Frauds so as to establish new precedent contrary to the intent and spirit of the decisional law of Pennsylvania?

4. Does not the judgment of the Court of Appeals establish a precedent which will aid in the perpetration of fraud by those who desire to do so?

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In reversing the judgment order of the District Court which was based on the Special Verdict of the jury.

2. In holding that a new contract had been entered into when the jury and the District Court found the original oral contract had only been modified.

3. In deciding a question of fact so as to deny petitioner his right to a jury trial in contravention of the Seventh Amendment of the Constitution of the United States and Rule 38(a) Federal Rules of Civil Procedure, 28 U.S.C.

4. In erroneously applying the Pennsylvania Statute of Frauds to a fact situation where the weight of authority is to the effect that the Statute of Frauds is not applicable.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The protection of the right to trial by jury in civil actions as guaranteed by the Seventh Amendment is one of the basic rights preserved by the Constitution. The decision of the Court of Appeals is predicated upon the reexamination by that Court of facts which had already been

tried by a jury and has thus deprived petitioner of this valued and basic right. It is of the utmost importance in the administration of justice that this Honorable Court prevent such a doctrine from establishing precedent for future encroachments upon the right to trial by jury.

The wisdom of the preservation of the right to trial by jury is clearly established when it is realized that the new contract found by the Court of Appeals is based upon an interpretation of differences in the types of goods sold under the two bills of sale which cannot be supported by the record in the Court below. In fact, the only evidence before the jury was to the contrary.

It is also of utmost importance that a precedent be not allowed to remain which, in view of the findings of the jury, permits the perpetration of fraud under the guise of the protection of the Statute of Frauds.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment or decree of the Court of Appeals for the Third Circuit should be granted.

HENRY MACIAS,
By HARRY ALAN SHERMAN,
Counsel for Petitioner.

Of Counsel,
JOSEPH M. WAPNER

II.

BRIEF IN SUPPORT OF PETITION

I.

THE JURY FOUND AS A FACT THAT THE ORIGINAL ORAL CONTRACT HAD BEEN ORALLY MODIFIED. THE COURT OF APPEALS DEPRIVED PETITIONER OF HIS RIGHT TO A JURY TRIAL WHEN IT FOUND AS A FACT THAT A NEW CONTRACT HAD BEEN ENTERED INTO

It was stipulated and understood in the District Court that petitioner's right to recover was based on the theory that the oral modification of October 19, 1948, was not within the purview of the Pennsylvania Statute of Frauds. It was petitioner's position that the part payment of $2,000.00, delivered to him on September 13, 1948 when the original oral contract was made, took that contract out of the Statute of Frauds and the oral modification did not operate to bring the entire oral contract under the Statute of Frauds. Petitioner also took the position that if the oral modification did bring the entire contract within the Statute of Frauds then the original part payment was sufficient to constitute a part payment within the meaning of the Statute of Frauds. The District Court sustained both contentions of petitioner and the jury, believing petitioner, returned a verdict in his favor.

It has been generally held that the question of whether a contract has been modified is a question of fact for the

jury. *Crown Central Petroleum Corporation v. Consolidated Oil Company of Houston, Texas,* 85 F. 2d 429 (C.A. 5, 1936) cert. den. 57 S. Ct. 193, 299 U.S. 600, 81 L. Ed. 443. It is also generally understood that where reasonable men might differ on inferences to be drawn from facts it is a question for the jury. *Bagwell v. Susman,* 165 F. 2d 412, (C.A. 6, 1947). See also 17 *C.J.S. Contracts, Section* 628.

The District Court submitted the case to the jury in the form of a special verdict. The first question on the special verdict form was: "Was the contract of sale entered into between Henry Macias, plaintiff and Morris Klein as President of the defendant company on September 13, 1948 later modified over the telephone by Henry Macias and Morris Klein acting for Oakland Truck Sales, Incorporated?" To this question the jury entered the following answer: "Yes".

Thus, the fact finding body—the jury—found that the original contract was modified. This finding was based on the exhibits (Plaintiff's Exhibits 1 and 3 as set forth in the appendix, *infra*), and also on the petitioner's testimony (R. 72) which was as follows:

> "Q. How many items are there, not quantities, but how many individual items by type of part are there on the order of October 19 which are not included at all on the order of October—of September 13?
>
> A. Well, there is only one item that doesn't duplicate itself, that possibly Mr. Klein cancelled the order on that when I talked to him before shipping the the rest of them. They all are the same, some amounts are larger, some are smaller, which Mr. Klein and I

agreed on the amount. I didn't send him anything that was any different.

Q. You say there is only one item on the order of October 19?

A. Well, as far as I can—

Q. (Continuing) For which there was nothing similar on the order of September 13?

A. These tie rods are about the only thing that I can see.

Q. Well, the tie rod ends?

A. I mean the tie rod ends. They were on the first order but—

Q. The tie rod ends were on the first order but you don't have any of them on the second order?

A. That is the only item that is not on the second order? We may not have had any or he may have cancelled.

Q. Now, are there any items on the second order of October 19 for which there were none on the first order?

A. Not that I can see.

Q. Not that you can see?

A. No."

This was after intense questioning by counsel for respondent concerning each individual item. The Court of Appeals, however, usurping the function of the jury and ignoring the above uncontradicted testimony found that the modified contract involved predominantly new parts so that the contract had to be regarded as a new contract and the Statute of Frauds had to be independently applied.

Although under the Seventh Amendment, the Court of Appeals can reverse the District Court on a question of law, in the instant case this principle is inapposite and begs the question. Before the Court of Appeals reversed the District Court on the legal question of the applicability of the Statute of Frauds it had to preliminarily decide the factual question that the modified contract was a new contract. It is the factual question which, we respectfully submit, the Court of Appeals did not have the Constitutional power to decide.

II.

BUT EVEN IF WE WERE TO ASSUME THAT THERE WAS A NEW CONTRACT, THE COURT OF APPEALS ERRED IN DECIDING THAT AS TO THE NEW CONTRACT THE STATUTE OF FRAUDS HAD NOT BEEN SATISFIED

The Pennsylvania Statute of Frauds which is involved and under which the enforceability of petitioner's claim must be determined is as follows:

> "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action or contracted to be sold or sold, and actually receive same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that

behalf." (Act of May 19, 1915, P. L. 543, Section 4, as amended; 69 Pa. Purdon's Stat. Ann. 42).

The learned trial judge carefully sought guidance in applying the pertinent statute law of Pennsylvania, in the judicial annals of that state. When, after exhaustive search by counsel for both parties, and doubtless even more thorough judicial scrutiny, no Pennsylvania decision was found to be in point, the Court properly pursued the logical course indicated by the Court of Appeals for the Third Circuit in *Stentor Electric Manufacturing Co. Inc. v. Klaxon,* 125 F. 2d 820, 824 (C.A. 3, 1942). The approved "available data" doctrine, followed by Federal Courts has very recently been adopted by the Pennsylvania Supreme Court, in construing a Federal statute upon which no controlling decision limited the application of the state court's logic. In an opinion by Mr. Justice Bell, in the case of *Thomas, Appellant v. Hempt Bros.,* 371 Pa. 383 at 392, that court conceives its prerogative to be:

> "When called upon to apply a federal statute, we necessarily give it the meaning which the highest federal judicial authority to pronounce upon it to date as ascribed to it; and, where courts of equal dignity have differed in their interpretations, we naturally accept the decision which to us reaches the more logical conclusion."

The defendant admitted that the Two Thousand ($2,000.00) Dollars was in the possession of plaintiff, and never made any demand for the return of the Two Thousand ($2,000.00) Dollars until action was filed by plaintiff for breach of contract when defendant sought recovery of the deposit money. The Pennsylvania statute

does not require part payment "at the time" of making the contract.

The case of *H. Feldman's Sons Co. v. Netsky,* 348 Pa. 237 is the most recent appellate decision in the State of Pennsylvania which construes section 4 of the Uniform Sales Act of May 19, 1915 P. L. 543, commonly referred to as the Statute of Frauds in regard to contracts for the sale of goods of the value of Five Hundred ($500.00) or upwards. The court there states, "* * * there is nothing in the statute which requires that the payment must itself be evidenced by a writing signed by the party to be charged. It is said with reference to this, in Williston on Contracts (revised) Volume 2, page 1612, sec. 565: 'The statute puts no limitation on the way that the price shall be paid and it seems an unnecessary piece of judicial legislation for courts to make the requirements of the statute more stringent than the legislation has done.' 'Payment' is any mode of discharging a debt by the performance of an act or the transfer of something of value, by the debtor; if so agreed upon by the parties, the cancellation of a debt, therefore, constitutes the pro tanto payment of a counter debt. *Whatever operates as a payment, no matter what form it takes, satisfies the Statute.*"

Certainly the Supreme Court of Pennsylvania did not intend by the above wording to confine the decision to the specific facts of the case before it. The court admitted that "the exact question here involved has apparently not been heretofore presented to either of our appellate courts, but there are decisions in other districts, which are in accord with the views here expressed."

The court then cites the decisions of the other states relied upon as follows: *Johnson v. Taber,* 101, Miss. 78, 57 So. 365; *Dieckman v. Young,* 87 Mo. app. 530; *Dow v. Worthen,* 37 Vt. 108; *Roberts v. Williams,* 6 Wash. 2d 599; *Norwegian Plow Co. v. Hanthorn,* 71 Wis. 529.

It is perhaps significant that the defendant counsel have avoided reference to the decisions upon which the Pennsylvania Superior Court relied in the Feldman case. Briefly, therefore, we will review the several cases cited in order to support the conviction of counsel for plaintiff that the Supreme Court intended the said case to cover the fact situation in the instant case.

In *Johnson v. Taber,* 101 Miss. 78, the purchaser gave the seller credit on his account for the purchase price of a horse and mare, and also a receipt. The seller later refused to deliver, and defended on the ground that the agreement to sell was unenforceable because there was no delivery and no part of the purchase price was paid as required by the Statute of Frauds. The court held:

> "* * * the credit given appellee upon his indebtedness, his actual discharge for any further obligation to pay the same to the extent of the agreed value of the property, constituted a payment of the purchase money * * *."

It is not necessary for the "purchase money" to be paid in coin or currency. It may be paid in anything in value which the parties agree upon, and which the seller is willing to receive in payment; and consequently the credit given appellee upon his indebtedness, his actual discharge from any further obligation to pay the same to the extent of the agreed value of the property, consti-

tuted a payment of the purchase money. 20 *Cyc.* 252. The term "purchase money" as used in this statute means simply the compensation or consideration which the seller is to receive from the property. *Devin v. Himer,* 29 Iowa 297.

In the Dieckman case, *supra,* the "payment" was also an entry of credit on the notes of the vendor.

In the Dow case, *supra,* the Vermont court held:

> "The statute only requires actual part payment. It does not require that such payment shall be shown by writing—by an endorsement, a credit, or a receipt—or by the manual delivery of any article or property of value. It leaves the parties to prove payment by such proof as they may have; but it does require proof of payment, and not of a mere agreement to pay or to apply in payment."

In the *Roberts v. Williams* case, *supra,* the Washington court reviewed the pertinent facts as follows:

> "On July 23, Mrs. Williams made a written offer to Roberts' agent to purchase Roberts' boat for the sum of $2,750.00, deposited a check for $100.00 and authorized him to turn it over to Roberts as part payment if the offer should be accepted. *After some negotiations in which the offer was momentarily withdrawn,* but immediately renewed, it was accepted. *The deposit was at no time withdrawn.* The parties intended when the deposit was made, that upon acceptance of the offer, the deposit should be retained by the seller as a part payment upon the oral contract. Here there was something more than a mere oral agreement that an antecedent debt arising out of some

previous transaction should be regarded as part payment. A provable act was performed. A check was delivered to constitute a part payment on the proposed contract if and when the offer should be accepted, and the offer was accepted."

The court, of course, held that the facts took the case out of the Statute of Frauds.

This Washington case, *supra,* decided in 1940, has been followed more recently by that court in the case of *Maryatt v. Hubbard,* 33 Wash. 2d 325. There the oral agreement was first made and check delivered later, accepted, endorsed, but not cashed, and later the sale "repudiated". The Court enforced the oral contract.

In passing, it is most interesting to note how similar the fact situation in the Roberts case is to the instant case.

In the Norwegian Plow case, *supra,* it was held that a credit given upon the books of the vendor for goods received was sufficient to take the case out of the Statute of Frauds. In this case the question as to whether or not the credit was actually entered was in issue, and the court there held that that was a question of fact, and not of law.

In 49 *American Jurisprudence,* page 587, par. 271, the law applicable to this case is cited. The general proposition is set forth under the caption heading "Money or other Property in Possession of Seller." The law is then stated to be as follows:

"Where money or other property is left in the possession of the seller, before a contract of sale is made, the condition of part payment which will take an oral contract for the sale of goods out of Para-

graph 4 of the Uniform Sales Act or of statutes of fraud like or similar to paragraph 17 of the English statute of frauds may exist."

The specific case cited by this authority seems to strengthen the present case; in the words of the work;

> "For instance, it has been held that where a sum of money accompanies an offer to purchase a chattel, with the understanding that it is to be applied on the purchase if the offer is accepted, and the offer is withdrawn but immediately renewed—the money never having left his (seller's) possession, it can be regarded as 'part payment' within the terms of the statute." (*Roberts v. Williams*, 108 P. (2d) 334, 131 A.L.R. 1246)

The author distinguishes the case from those where a mere antecedent debt arising out of some previous transaction is credited as part payment. He says:

> "This is more than a mere oral agreement that an antecedent debt arising out of some previous transaction should be regarded as part payment; a provable act was performed."

In conclusion, the observation of the trial judge seems to be extremely pertinent to this discussion. He stated:

> "Indeed, it seems to be anomalous if alterations of a valid sale, which had been taken out of the Statute of Frauds, could not be made without requiring the seller to return the fixed part payment to the buyer in order to have it repaid to him again at the times when the parties consummated each change. As a practical matter business men, after agreeing upon al-

terations in a parol sale, would act just as the parties in the instant case acted."

Under the decision of the Court of Appeals, the penalty for acting as a reasonable businessman is to have the modified contract entered into declared unenforceable. Such is not the intendment of the Statute nor of the decisional law.

It is respectfully submitted that in view of the fact that petitioner's right to a jury trial on a vital issue of fact has been violated; and in view of the fact that the precedent established by the Court of Appeals would aid in the perpetration of fraud under the guise of the protection of the Statute of Frauds, it is respectfully submitted that the writ of certiorari should issue.

HARRY ALAN SHERMAN,
Counsel for Petitioner.

Of counsel:
JOSEPH M. WAPNER.

Exhibit No. 1

APPENDIX

EXHIBIT 1

Henry's
Truck Parts & Sales
Military Parts for all G. I. Trucks

No. 3144

Phone TRinity 3533
2000 E. Olympic Boulevard, Los Angeles 21, Calif.

Date September 13, 1948

To Oakland Truck Sales
Address 3514 Forbes St., Pittsburgh, Penna.

Quantity	Article No.	Description	Price
	150	Dodge Axle Howsings	1875.00
	500	Spider Gear belt Stude part	1500.00
	200	GMC Transfer Boxes	2000.00
	200	Dodge Trans. Cases	600.00
	200	GMC Transfer Covers	600.00
	5000	Dodge Emergency Brake Kits	600.00
	200	Tie Rod ends	100.00
	500	Tie Rods	250.00
	300	Tork Arm Belts	150.00
	50	¾Ton Dodge Bearing	125.00
			$ 7800.00
		Deposit	2000.00
		Balance	5800.00

EXHIBIT 3

Henry's
Truck Parts & Sales
Military Parts For All G. I. Trucks

No. 3288

Phone TRinity 3533
200 E. Olympic Boulevard, Los Angeles 21, Calif.

Date Oct. 19, 1948

To Sid's Truck Parts
Address 13815 Glen River Road, Detroit, Michigan

Your Order No. C.O.D.

Quantity	Article No.	Description	Price
	17832	Dodge Tork Arm Balls Balls @ .50	8,916.00
	3200	Dodge Emergency Brake Kits @ .12	384.00
	654	Dodge Tie Rods @ .50 A	327.00
	30	Dodge Axle Howsing @ 12.50 A	375.00
	15	Dodge Axle howsings @ 12.50 A	187.00
	84	GMC Transmitter Cover @ 3.00	252.00
	150	GMC Transfer Boxes @ 10.00	1,500.00
	300	GMC Diff. Kits @ 3.00	900.00

Exhibit No. 3

90	Dodge Transmitter cases @ 3.00	270.00
50	Dodge P. Bearings @ .50 A	125.00
		$13,236.50
	Deposit	2,000.00
	Balance	$11,236.50